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In The

Supreme Court of the United States

HAROLD F. RICE,

Petitioner,

v.

BENJAMIN J. CAYETANO,
GOVERNOR OF THE STATE OF HAWAII,

Respondent.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit

BRIEF OF AMICI CURIAE STATE COUNCIL OF HAWAIIAN HOMESTEAD ASSOCIATIONS, HUI KĀKO'O 'ĀINA HO'OPULAPULA, KALAMA'ULA HOMESTEAD ASSOCIATION AND HAWAIIAN HOMES COMMISSION IN SUPPORT OF RESPONDENT

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I. INTEREST OF AMICI[1]

Congress created the *HAWAIIAN HOMES COMMISSION* in 1921 to hold in trust and manage over 203,000 acres of lands for the benefit of descendants of aboriginal Hawaiians under the terms of the Hawaiian Homes Commission Act ("HHCA").[2] The *STATE COUNCIL OF HAWAIIAN HOMESTEAD ASSOCIATIONS* ("SCHHA") is an umbrella organization that represents 22 Hawaiian Homestead Associations which, in turn, represent beneficiaries who hold over 6,800 leases. *HUI KĀKO'O 'ĀINA HO'OPULAPULA*[3] ("HUI") represents Native Hawaiians who are waiting to receive HHCA leases. There are over 30,000 pending applications and many beneficiaries have been on the waiting list for decades. *KALAMA'ULA HOMESTEAD ASSOCIATION* ("KALAMA'ULA"), the first and oldest Homestead Association, was founded in 1922 on the island of Moloka'i. In 1926, the Kalama'ula Homesteaders successfully demonstrated their ability to farm the marginal lands awarded to them, thereby winning Congressional approval to continue the homesteading program.

The members of SCHHA, HUI and KALAMA'ULA are intended beneficiaries of the trust created by § 5(f) of the Hawai'i Admission Act. They have a direct and substantial

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[1] The parties have consented in writing to the filing of this brief in letters that have been submitted to the Clerk. *See* S.Ct. R. 37.3(a). Pursuant to Rule 37.6, the amici state that no counsel for a party authored this brief in whole or in part, and that no person or entity other than the amici and their counsel made any monetary contribution to the preparation or submission of this brief.

[2] Act of July 9, 1921, 42 Stat. 108 (1921). There are 29 homestead communities on 6 islands throughout the State (O'ahu, 7; East Hawai'i, 6; West Hawai'i, 4; Maui, 4; Moloka'i, 4; Kaua'i, 3; Lāna'i, 1). Of 6,809 homestead leases, 1,043 are agricultural leases; 298 are pasture leases; and 119 are commercial general leases. The rest are residential leases.

[3] *Hui Kāko'o 'Āina Ho'opulapula* may be translated as "guardians of the homestead lands." Mary Kawena Pukui and Samuel H. Elbert, *Hawaiian Dictionary*, 86, 120 & 352-53 (1986 ed.).

legal interest in this matter. Reversal of the decision below could repudiate both the 1921 HHCA and terms of the 1959 Hawai'i Admission Act.

II. SUMMARY OF ARGUMENT

The native people of Hawai'i lost 99% of their lands and over 90% of their population in the 120 years between discovery (1778) and annexation by the United States (1898). The 1921 HHCA was Congress's first attempt to restore some of these lands to the native people. Crown and government lands previously ceded to the United States at annexation (including HHCA lands) were returend to Hawai'i in the 1959 Admissions Act, subject to special trusts for the benefit of Hawaiians. Responsibility for managing these federally created trusts was delegated to the State of Hawai'i, and made a specific condition to its admission to the Union. This federal delegation to the State of trust responsibility to the native people is unique. It is this trust responsibility that the State sought to carry out when it created the Office of Hawaiian Affairs.

In the land tenure system of pre-Western contact Hawai'i, the land was communally controlled by the chiefs and the commoners – this concept of land management most closely resembled a trust, with the chiefs as trustees and the common people as beneficiaries. Throughout the 19th century, Hawaiian leaders attempted to preserve this trust concept even as they were pressured to adopt increasingly Western-style property laws. In 1893, Queen Lili'uokalani was overthrown by an annexationist group dominated by Americans, and assisted by the United States Minister to Hawai'i and United States military forces.[4]

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[4] President Grover Cleveland, in a message to Congress dated December 18, 1893, said that "By an act of war, committed with the participation of a diplomatic representative of the United States and without authority of Congress, the Government of a feeble but friendly and confiding people has been overthrown. A substantial wrong has thus been done which a due regard for our national character as well as the rights of

Despite two centuries of struggle to perpetuate their culture and traditions, Hawaiians today remain a vibrant and culturally cohesive people, for whom the Office of Hawaiian Affairs and the *HAWAIIAN HOMES COMMISSION* now serve as trustees. These trusts comprise the bare remnants of land and political authority left to the first people of these Islands. In creating these trusts, Congress recognized a special relationship with Hawai'i's indigenous people.

The decision and judgment of the Ninth Circuit Court of Appeals should be affirmed.

III. ARGUMENT

A. Hawaiian Society, Culture, Traditions, And Land Tenure Thrived For More Than 1300 Years Before Western Contact In 1778.

Aboriginal Hawaiians are the native and indigenous people of the Hawaiian islands. Their culture and traditions are irrevocably intertwined with the life of those lands.[5] Hawaiians' relationship to the islands began with the Polynesian voyages of discovery from the Marquesas (100-400 A.D.) and later Tahiti.[6] The sophisticated culture, society, and

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the injured people requires we should endeavor to repair." *President's Message*, Executive Document No. 47, 53 Cong., 2d Sess., December 18, 1893 (lodged with the Court) [hereinafter *President's Message*].

[5] *See generally* Patrick V. Kirch, *Feathered Gods and Fishhooks* (1985) [hereinafter *Kirch*]; Patrick V. Kirch & Marshall Sahlins, *Anahulu: Vol. One – Historical Ethnography; Vol. Two – The Archeology of History* (1992) [hereinafter *Kirch and Sahlins*]; Ralph S. Kuykendall, *The Hawaiian Kingdom*, Vol. I, II & III (1938, 1953, & 1967) [hereinafter *Kuykendall*].

[6] Ben Finney, *Voyage of Rediscovery: A Cultural Odyssey through Polynesia* (1995). These origins demonstrate that "Hawaiians" are in fact not a "race" at all, but only the subgroup of Polynesians who occupied the Hawaiian islands, developed their own society, culture, traditions, and land tenure system from circa 100 A.D. to the present. *Kirch, supra* note 5, Chapter 4 and 58-60. The first Polynesian migration to the Hawaiian

traditions that they developed over the succeeding centuries were undisturbed by Western contact until 1778.[7]

The Hawaiian land tenure system was communal and subsistence-based, but subject to the territorial control of a class of chiefs.[8] The chiefs provided stewardship over the land, regulating the use of scarce resources, the maintenance of irrigation systems, and the conduct of rituals. Although sometimes mischaracterized as feudal, the land tenure system was unique to the islands. The commoners had no military duty. They were free to move if a chief was too oppressive. Chiefs who abused the people would lose their labor force or be replaced.[9] Reciprocal relationships wove a fabric of mutual obligations between the *ali'i* (chiefs) and the *maka'āinana* (commoners) that characterized Hawaiian society when westerners first arrived in 1778.[10]

Land use developed around geographic units (*ahupua'a*) running from the mountain to the ocean, with boundaries that followed mountain ridges, streams, or other natural features.[11] Under the management of the chiefs, commoners provided the labor to work the land, creating sophisticated irrigation systems for taro[12] cultivation and developing ocean-based aquaculture by constructing a system of shoreline fishponds. Essential goods were shared and

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islands between 100-400 A.D. was at least 400 years before Charlemagne's Holy Roman Empire, 600 years before the Norman Conquest of England, 1000 years before Columbus "discovered" the Americas, and 1300 years before the founding of our nation. *See Kirch, supra* note 5, at 285-308.

[7] *Kirch, supra* note 5, at 4-7, 67-68 & 284-308.

[8] *Id.* at 293-94.

[9] *Id.* at 4-5 & 7.

[10] *Kuykendall, supra* note 5, vol. I, at 10-11; *Kirch, supra* note 5, at 284-308; E.S. Craighill Handy and Mary Kawena Pukui, *The Polynesian Family System in Ka'u* (1952) [hereinafter *Handy and Pukui*].

[11] *In re Boundaries of Pulehunui*, 4 Haw. 239 (1879).

[12] Taro or *kalo* is a kind of aroid cultivated as a staple food by Hawaiians since earliest times. Mary Kawena Pukui and Samuel H. Elbert, *Hawaiian Dictionary* 123 (1986 ed.); E.S. Craighill Handy and E.G. Handy, *Native Planters in Old Hawaii* 92-110 (1972) [hereinafter *Handy and Handy*].

traded among fishermen, mountain dwellers and cultivators in an extended family network known as the *'ohana*.[13] In this culture, land was not a commodity to be owned or traded. Instead, it existed as an older sibling with whom reciprocal obligations were to be shared.[14]

B. Western Influences Had Devastating Effects On The Hawaiian Nation.

Captain James Cook's 1778 "encounter" with Hawai'i and with Hawaiians produced social consequences no less profound than Christopher Colombus's trans-Atlantic crossing did for the native peoples of North America. The unexpected arrival of the Western sailors, merchants, and missionaries with world views and practices unknown to the isolated Polynesian islands was traumatic. As with the "Indians" of North America, death rates for Hawaiians rose precipitously after contact due to their vulnerability to common European diseases and other maladies of "civilization."[15]

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[13] Davianna Pomaika'i McGregor, *An Introduction to* Hoa'aina *and Their Rights*, 30 Hawaiian Journal of History 1, 5 (1996) [hereinafter *McGregor*].

[14] Lilikalā Kame'elehiwa, *Native Land and Foreign Desires: Pehea Lā E Pono Ai?* 23-33 (1992) [hereinafter *Kame'elehiwa*]. Hawaiian legend traces the ancestry of Hawai'i's islands and people to the sky god, Wākea, and the earth goddess, Papa. Their first-born child, Hāloa naka, was stillborn and his small body, when buried, became the first taro root. Their second child Hāloa, named for the first, was the first Hawaiian. 6 A. Fornander, *Collection of Hawaiian Antiquities and Folklore* 360 (1920); David Malo, *Hawaiian Antiquities* 244 (1951).

[15] The Hawaiian population declined 50% in the first 27 years of western contact (from 300,000 to 152,000 between 1778-1805) and 72% within 72 years of contact (from approximately 300,000 in 1778 to less than 84,000 in 1850). R.S. Schmitt, *The Missionary Census of Hawaii*, Pacific Anthropology Record No. 20, at 41 (1973), *cited in 1 Native Hawaiians Study Commission Report On The Culture, Needs and Concerns of Native Hawaiians Pursuant to Pub. L. No. 96-565, Title III* 87, 471 (Dept. Of Interior June 23, 1983) [hereinafter *Native Hawaiians Study Commission Report*]. *See also Andrew W. Lind, Hawaii's People* 17 (1955);

Under pressure from the Western newcomers, rapid social changes took place, including: the political unification of the islands under Kamehameha I (1790-1810), the introduction of whaling (1820's) and the sandlewood trade (1810), the lifting of religious taboos (1819), the arrival of Christian missionaries (1820), suppression of traditional cultural activities (1820), adoption of Western legal principles (1839-40),[16] and transition to a modified system of private property (1848).

The concept of private ownership of land had no place in Hawaiian thought or history prior to the mid-Nineteenth Century. For the previous 1700 years, Hawaiians had a relationship to the land based upon actual use, care for the land (*aloha 'āina*), and reciprocal rights and obligations with the hierarchy of *ali'i* or chiefs who could not dispossess Hawaiian commoners without cause. This concept of communal land tenure was made a part of Hawai'i's first constitution in 1840, which said that the people had an interest in the kingdom in common with that of the chiefs and the King.[17]

This communal land tenure system, under pressure from American business interests, ended during the reign of Kamehameha III.[18] In its *Principles Adopted By The Board of*

R. Kekuni Blaisdell, M.D., *Health Section*, in *1 Native Hawaiians Study Commission Report* 99-115.

[16] "The Hawaiian chiefs who adopted the Anglo-American legal system faced the periodic reappearance of European gunboats threatening to flatten harbor towns. This pressure fueled their willingness to accept European notions of the superiority of civilization and the rule of law." Sally Engle Merry, *Law, Culture, and Cultural Appropriation*, 10 Yale J.L. & Humanities 575, 602 (1998) (describing "resistant appropriation" as a way to protect the Hawaiian nation from further political conquest).

[17] 1840 Constitution, *reprinted in* Hawaiian Laws 1841-1842 10 (1994) ("[The land] was not [Kamehameha I's] own private property. It belonged to the chiefs and people in common, of whom Kamehameha I was the head, and had the management of the landed property.").

[18] Gavan Daws, *Shoal of Time*, 124-28 (1968). *See also* Commission to Quiet Land Titles; Awards, Patents, Etc., Laws of Hawaii 109 (1846), *reprinted in* 2 Revised Laws of Hawaii 2120-24 (1925); Principles

Commissioners to Quiet Land Titles in Their Adjudication of Claims Presented to Them, the Land Commission declared that "there are but three classes of persons having vested rights in the land, 1st, the government (the king), 2nd, the landlord (the chief and the *konohiki*), and 3rd, the tenant."[19] In 1848, Kamehameha III and his chiefs approved a plan known as the *Māhele*[20] – which effectively ended Hawai'i's ancient communal land tenure system, and gave Westerners a way to acquire fee simple ownership of Hawaiian lands.[21] The commoners were permitted to file claims to obtain fee-simple title to the land where their houselots and subsistence taro patches were located.[22] Few did so.[23] Of more than 1.3

Adopted By The Board of Commissioners To Quiet Land Titles In Their Adjudication Of Claims Presented To Them, Laws of Hawaii 81 (1847), *reprinted in* 2 Revised Laws of Hawai'i 2130 (1925).

[19] Principles Adopted By The Board Of Commissioners To Quiet Land Titles In Their Adjudication Of Claims Presented To Them, Laws of Hawaii 81 (1847), *reprinted in* 2 Revised Laws of Hawai'i 2126 (1925).

[20] Jon J. Chinen, *The Great Mahele, Hawai'i's Land Division Of 1848* 20 (1958) [hereinafter *Chinen*]. *See also* Commission to Quiet Land Titles, Laws of Hawaii 107 (1847) & Principles Adopted by Land Commission, Laws of Hawaii 81 (1847), *reprinted in* 2 Revised Laws of Hawaii 2120-2142 (1925). "*Māhele*" means portion, division, section, or sharing. Mary Kawena Pukui and Samuel H. Elbert, *Hawaiian Dictionary* 219 (1986 ed.).

[21] Commoner's rights arising out of custom and usage still survive. *See* Haw. Rev. Stat. § 1-1 (1993) (custom as of 1892 codified as common law); *Id.* at § 7-1 (native tenants' rights preserved); Haw. Const. art. XII, § 7 (1978). *Public Access Shoreline Hawaii v. Hawai'i County Planning Commission*, 903 P.2d 1246 (Haw. 1995), *cert. denied*, 517 U.S. 1163 (1996) (discussing the survival of traditional and customary gathering rights by Hawaiians).

[22] Laws of Hawaii 202 (1850), *reprinted in* 2 Revised Laws of Hawaii 2141-42 (1925).

[23] Of approximately 28,000 adult male Hawaiians then living, only about 7,500 lots – totaling 0.6% of the 4.1 million acres of land in Hawai'i – were awarded to the commoners. Melody Kapilialoha MacKenzie, *Native Hawaiian Rights Handbook* 8 n. 46 (1991) [hereinafter *MacKenzie*]; J.

million acres given by the King to the "people" through the *Māhele*, less than 29,000 acres were awarded to native Hawaiian tenants,[24] who had little understanding of the consequences of the *Māhele*.[25]

Over the next three decades, the monarchy faced increasing pressure from the Hawaiian people to address the loss of their land and political control over their nation. By 1893, Queen Lili'uokalani had decided to promulgate a new constitution that would restore native Hawaiian voting power.[26] The Queen's attempt to change the Constitution precipitated her overthrow and the subsequent annexation by the United States. The loss of their Queen and their land prompted an outpouring of grief and protest among Hawaiians throughout the kingdom,[27] but their resistance was to no avail.

Hobbs, *Hawaii – A Pageant Of The Soil* (1935); Neil Levy, *Native Hawaiian Land Rights*, 63 Cal. L. Rev. 848, 853-57 (1975).

[24] *Chinen, supra* note 20 at 31.

[25] *Hawaiian Homes Commission Act, 1920: Hearings before the Committee on Territories of the United States Senate on H.R. 13500; A Bill to Amend An Act Entitled "An Act To Provide A Government For The Territory of Hawaii," Approved April 30, 1900, As Amended, To Establish An Hawaiian Homes Commission, And For Other Purposes*, 66th Congress, 3rd Sess. 68-69 (1921) (statement of Prince Jonah Kuhio Kalanianaole) [hereinafter *1921 Senate Hearings*] ("All they knew of the value of the lands was in the cultivation of same for their food. . . . [Y]ou can readily understand why the Hawaiians did not take advantage of that which the law recognized as theirs.").

[26] *Kuykendall, supra* note 5, vol. III at 582. The draft Constitution prepared by the Queen in 1893 would have returned property qualifications for voting to the lower level established in the Constitution of 1864. *Id.* at 582, 586. *See also* Joint Resolution to Acknowledge the 100th Anniversary of the January 17, 1893 Overthrow of the Kingdom of Hawaii, and to Offer Apology to Native Hawaiians on Behalf of the United States for the Overthrow of the Kingdom of Hawaii, Pub. L. No. 103-150, 107 Stat. 1510 (1993) [hereinafter Public Law 103-150].

[27] After the overthrow, the Queen's Royal Hawaiian Band was ordered by the new government to sign a loyalty oath. Bandmembers were "threatened with dismissal, and told that they would soon be eating rocks

In 1898, the United States annexed Hawai'i by Joint Resolution, and 1.8 million acres of government and crown lands were ceded by Hawai'i, without compensation, to the United States. There was never any plebiscite of the Hawaiian people on the question of annexation, and contemporary observers were convinced that if there had been a popular vote, it would have been overwhelmingly against annexation.[28] Nonetheless, the United States acquired Hawai'i and in 1900 made it a Territory.[29] For the Queen, who had not militarily resisted her overthrow in hopes that the United States government would nullify the actions of its agents,[30]

(since they would have no money to buy food)." Noenoe K. Silva, *Kanaka Maoli Resistance to Annexation*, 1 'Ōiwi: A Native Hawaiian Journal 51 (1998) [hereinafter *Silva*]. The Band members refused to sign the oath, and told their story to a local songwriter who then composed a famous protest song entitled *Kaulana Nā Pua* (Famous are the Children), also known as *Mele 'Ai Pōhaku* (the Stone-Eating Song). *Id.* The lyrics repeated the Band members' resolve that they would rather eat stones than give up their land. *Ua lawa mākou i ka pōhaku, I ka 'ai kamaha'o o ka 'āina.* The song's sweet melody belies the bitterness of its lyrics. *Id.*; Albert J. Schütz, The *Voices of Eden* 353-54 (1994) [hereinafter *Schütz*]. This song is still sung today, in remembrance of the love that Hawaiians have for their land.

[28] 42 U.S.C. § 11701(11) (1995); J. Res. 55, 55th Cong., 2d. Sess., 30 Stat. 750 (1898); 2 *Native Hawaiians Study Commission Report* 168 n. 9; T. Coffman, *Nation Within* 272-287 (1998) (More than 21,000 people signed petitions opposing annexation. At the time, there were only 40,000 Hawaiians). *See also* Three editorials by Edward L. Like & E.A. Nawahi, eds., [*Ke Aloha Aina*], *translated in*, 1 'Ōiwi: A Native Hawaiian Journal 81-93, 94-100, 101-03 (1998) (originally published in 1897, these editorials poignantly recount efforts to gather signatures for petitions opposing annexation).

[29] Hawaii Organic Act, ch. 339, 31 Stat. 141 (1900) [hereinafter *Organic Act*].

[30] "She knew that she could not withstand the power of the United States, but she believed that she might safely trust to its justice." *President Message, supra* note 4.

annexation "***extinguish[ed] the nationality of my poor people***."[31]

C. Congress Recognized The Historical Plight Of The Descendants Of Aboriginal Hawaiians In The Hawaiian Homes Commission Act Of 1921.

Two decades later, Congress responded to the problems of the Hawaiian people by adopting the Hawaiian Homes Commission Act, 1921 ("HHCA").[32] The purposes of the HHCA were twofold: (1) to "rehabilitate" the dying Hawaiian people by returning them to the land,[33] and (2) to redress an historically inequitable distribution of land that left the overwhelming majority of the Hawaiian population without title to the very land on which they lived.[34]

1. Congress Sought To Stop The Rapid Decline Of The Hawaiian Population.

In 1920-21, the continued existence of the Hawaiian culture and society was in jeopardy. The House Committee on the Territories reported that: "[T]he number of full-blooded Hawaiians in the Territory has decreased since the estimate of

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[31] Lydia Kamaka'eha Lili'uokalani, *Hawaii's Story by Hawaii's Queen* 309-10 (1990) (emphasis added).

[32] Hawaiian Homes Commission Act, 42 Stat. 108 (1921). *See generally*, Lesley Karen Friedman, *Native Hawaiians, Self-Determination and the Inadequacy of State Land Trusts*, 14 Univ. Haw. L. Rev. 519, 536-539 (1992) (a summary of background of the HHCA); Daws, *supra* note 18, at 296-99 (political analysis).

[33] H.R. Rep. No. 839, 66th Cong., 2d Sess. 4 (1920) (statement of John Wise, Senator of the Territorial Legislature).

[34] *Id.* at 2-7. *See also* James Blount, Letter to W.Q. Gresham, U.S. Secretary of State, dated July 17, 1893, Report of the Commissioner to the Hawaiian Islands (Government Printing Office, 1893) ("The landless condition of the native population grows out of the original distribution and not from shiftlessness. To them homesteads should be offered rather than to strangers.")

1826 from 142,650 to 22,500,"[35] and there would be none left in a few years.[36]

Senator John H. Wise, a member of the Legislative Commission of the Territory (of Hawai'i) and one of the authors of the HHCA, testified before the United States House of Representatives:

> The idea in trying to get the lands back to some of the Hawaiians is to rehabilitate them. I believe that we should get them on lands and let them own their own homes. . . . The Hawaiian people are a farming people and fishermen, out of door people, and when they were frozen out of their lands and driven into the cities they had to live in the cheapest places, tenements. That is one of the reasons why the Hawaiian people are dying. Now, the only way to save them, I contend, is to take them back to the lands and give them the mode of living that their ancestors were accustomed to and in that way rehabilitate them.[37]

Prince Jonah Kuhio Kalanianaole ("Prince Kuhio"), the Territory's sole delegate to Congress, testified before the full U.S. House of Representatives: "The Hawaiian race is passing. And if conditions continue to exist as they do to-day, this splendid race of people, my people, will pass from the face of the earth."[38] Secretary of Interior Lane attributed the declining population to health problems like those faced by the "Indian in the United States" and concluded the Nation must provide similar remedies.[39]

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[35] *Id.* at 2.

[36] H.R. Rep. No. 209, 67th Cong., 1st Sess. 1-2 (1921).

[37] *Id.* at 3-4. Wise's testimony was quoted and adopted in the House Committee on the Territories' report to the full U.S. House of Representatives.

[38] 59 Cong. Rec. 7453 (1920) (statement of Prince Jonah Kuhio Kalanianaole).

[39] H.R. Rep. No. 839, 66th Cong., 2d Sess. 5 (statement of Secretary of Interior Lane).

2. Congress Sought To Redress An Historically Inequitable Distribution Of Land That Left Three Quarters Of The Hawaiian Population Homeless.

In support of the HHCA, the House Committee on the Territories recognized that, prior to the *Māhele*, Hawaiians had a one-third interest in the land. The Committee reported that the HHCA was necessary to address the way Hawaiians had been short-changed in prior land distribution schemes:

> The second great factor demanding passage of this bill lies in the ineffectiveness of all previous systems of land distribution. . . . **[H]aving been recognized as owners of a third interest in the lands of the kingdom, the common people, believing that in the future means were to be adopted to place them in full possession of these lands, assumed that the residue was being held in trust by the Crown for their benefit.** However, the lands were never conveyed to the common people and, after a successful revolution, were arbitrarily seized, and by an article in the Hawaiian constitution became the public lands of the Republic of Hawaii.[40]

Prince Kuhio further testified before the U.S. House of Representatives that Hawaiians had an equitable interest in the unregistered lands that reverted to the Crown before being taken by the Provisional Government and, subsequently, the Territorial Government:

> [T]hese lands, which we are now asking to be set aside for the rehabilitation of the Hawaiian race, **in which a one-third interest of the common people had been recognized, but ignored in the division,**

[40] H.R. Rep. No. 839, 66th Cong., 2d Sess. 5 (1920) (emphasis added). *See also* Prince J.K. Kalanianaole, *The Story of the Hawaiians*, The Mid-Pacific Magazine, Vol. XXI, No. 2, February 1921, at 126, col. 2 (lodged with the Court).

> **and which had reverted to the Crown, presumably in trust for the people, were taken over by the Republic of Hawaii. . . . By annexation these lands became a part of the public lands of the United States, and by the provisions of the organic act are under the custody and control of the Territory of Hawaii.** . . . We are not asking that what you are to do be in the nature of a largesse or as a grant, but as a matter of justice – belated justice. . . .[41]

Thus, in 1921, Congress recognized the existence of a special relationship between the United States and Hawaiians and the equitable interest the Hawaiian people held in public lands.

The Hawaiian Home Lands conveyed to the State of Hawai'i were limited to over 203,000 acres of marginally useful lands and the beneficiaries were limited by a 50% blood requirement.[42] The pressing needs for a program that could address the needs of other Hawaiians were ignored. Likewise, needs beyond lands for homesteading (*e.g.*, health care and education) were not addressed.

[41] 59 Cong. Rec. 7452-7453 (1920) (statement of Prince Jonah Kuhio Kalanianaole) (emphasis added). *See also Proposed Amendments To The Organic Act of the Territory of Hawaii: Hearings before the Committee on the Territories for the House of Representatives*, 66th Cong., 2d Sess. 170 (1920) [hereinafter *1920 House Hearings*] ("[T]he Hawaiians were deprived of their lands without any say on their part, either under the kingdom, under the republic, or under the United States Government.") (statement of Rep. Charles F. Curry, Chairman); *1920 House Hearings* at 88 ("[T]hese crown lands never really vested in the Federal Government except in trust for the common people. . . . That they were placed in trust for the common people when in possession of the king, *and just as we have provided land for the Indians*, we may use these lands to provide for the Hawaiian lands.") (statement of Rep. Charles F. Curry, Chairman) (emphasis added).

[42] In 1986, Congress authorized Hawaiians with at least 25% native blood to succeed to the leases of their parents and spouses. Joint Resolution to Consent to an Amendment Enacted by the Legislature of the State of Hawaii to the Hawaiian Homes Commission Act, [1921], Pub. L. No. 99-557, 100 Stat. 3143 (1986).

D. Congress Conditioned Hawai'i's Admission As A State Into The Union Upon The Assumption Of Trust Duties Over HHCA And Other Returned Public Lands In Recognition Of The United States' Special Relationship To The Indigenous Hawaiian People.

In the Joint Resolution (1898) annexing Hawai'i, Congress expressly imposed a trust on Hawai'i's public government and Crown lands.[43] In 1900, Congress confirmed this trust in the Organic Act, ch. 339, 31 Stat. 141, §§ 73(e) and 91 (1900). With the passage of the HHCA, Congress sought in part to fulfill these trust duties for the Hawaiian people.

In the 1959 Hawai'i Admission Act, § 4, Congress required that the State of Hawai'i adopt the HHCA as part of its constitution and assume management over Hawaiian home lands:

> As a compact with the United States relating to the management and disposition of the Hawaiian home lands, the Hawaiian Homes Commission Act, as amended, shall be adopted as a provision of the Constitution of said State, . . . subject to amendment or repeal only with the consent of the United States, and in no other manner.[44]

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[43] 22 U. S. Op. Att'y Gen. 627, 630 (1899) ("The effect of this clause [in the annexation resolution] is to subject the public lands in Hawai'i to a special trust. . . . "). The Petitioner's cursory statement that "public lands" transferred from the Provisional Government to the United States upon annexation were "free and clear of any encumbrances or obligations," and his reference to then Hawai'i Attorney General Harry Irwin's statement in the 1921 hearings before the Senate Committee on the Territories, Petitioner's Brief, at 2-3 & 4 n.1, are not accurate. The House Committee reporting to the full House rejected Irwin's views and found that the "second great factor demanding passage of this bill" was the inequitable land distribution system in the *Māhele*. H.R. No. 839, 66th Cong., 2d Sess. 5 (1920).

[44] Act of March 18, 1959, Pub. L. No. 86-3, 73 Stat. 4, § 4 (1959). The provision was incorporated in Hawai'i's Constitution, now codified in Article XII, § 3. The people of Hawai'i adopted the provision pursuant to the plebiscite required by § 7 of the Admission Act.

Congress further required in § 5 of the Admission Act that the public government and crown lands which were ceded to the United States by the Republic of Hawaii in 1898, and not retained by the United States, must be conveyed to the State and held:

> [t]ogether with the proceeds from the sale or other disposition of any such lands and the income therefrom, . . . as a public trust . . . for the betterment of the conditions of native Hawaiians, as defined in the Hawaiian Homes Commission Act, 1920, as amended. . . . Such lands, proceeds and income shall be managed and disposed of for one or more of the foregoing purposes in such manner as the constitution and laws of said state may provide, and their use for any other object shall constitute a breach of trust for which suit may be brought by the United States. . . . [45]

Congress, through the 1959 Admission Act, § 1, accepted, ratified and confirmed the 1950 Constitution adopted by the people of Hawai'i in the election of 1950[46] and further required that the State meet the conditions in § 4 (incorporating the HHCA) and § 5 (public trust on returned ceded lands). By accepting the state constitution and enacting § 4 and § 5(f), Congress delegated broad authority to the State to carry out the obligations that the United States itself had accepted upon acquiring the Hawaiian islands. The State consented to this delegation as a condition of statehood.

The Attorney General of the United States opined that the ceded lands of Hawai'i were a "special trust," the "naked title being held by the Federal Government for the benefit of the

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[45] *Id.* at § 5(f).

[46] Included in the 1950 Constitution was a provision that stated "[a]ny trust provisions which the Congress shall impose, upon the admission of this State, in respect of the lands patented to the State by the United States or the proceeds and income therefrom, shall be complied with by appropriate legislation." Haw. Const. art. XVI, sec. 7, s. 1 (1978) (formerly art. XIV, sec. 7 (1950)).

people of Hawaii."[47] In 1964, Congress passed the Revised Conveyances Procedures Act[48] and reaffirmed the special trust status of those lands held by the United States.

> The bulk of the lands involved, which were ceded at the time of annexation, have always been treated differently than the other public lands of the United States. **History clearly indicates that those lands were regarded as having been held in a special trust status by the United States for the benefit of the Hawaiian people.**[49]

The HHCA and the Admission Act § 5(f) trusts are *both* federal law *and* State law.[50] They are integral to the Compact

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[47] 42 Op. Att'y Gen. 43, 46-47 (June 12, 1961).

[48] Pub. L. No. 88-233, 77 Stat. 472, 88th Cong., 1st Sess., *reprinted in* U.S.C.C.A.N. 1362-1366 (1963).

[49] Letter from Kermit Gordon, Director, Bureau of the Budget, to Lyndon Johnson, October 28, 1963, S. Rep. No. 675, on Pub. L. No. 88-233, 88th Cong., 1st Sess., *reprinted in* U.S.C.C.A.N. 1362-1366 (1963).

> If [Pub L. No. 88-233] is not enacted, the [public government and Crown] lands, which the Federal Government received by voluntary cession and donation of the people of Hawaii and for which it paid no compensation, would become subject to disposal under the Federal property laws [in 40 U.S.C. § 471 et seq.] after August 21, 1964 when they become surplus. Under the terms of the Statehood Act, Hawaii would thus lose its long recognized residual interest in such lands and the 60 year practice of returning such lands to Hawaii when they are no longer needed would be terminated. Such a result would be in effect a reverse land grant that would be highly inequitable in view of the history of the subject lands and the spirit and intent of the Statehood Act.

[50] Although the HHCA is not codified in the United States Code, it was never repealed. By its own terms, the HHCA may only be amended with the consent of Congress. During the territorial period, Congress amended the HHCA 22 times. *Federal-State Task Force on the Hawaiian Homes Commission Act: Report to the United States Secretary of Interior and the Governor of the State of Hawaii* 213-228 (August 15, 1983). From

by which Hawai'i became a State in the Union. They were both expressly ratified by Congress and the people of Hawai'i at Statehood in Section 7 of the Admissions Act. They reaffirm the "special relationship" between the United States and the indigenous Hawaiian people that has been political in its nature from inception.[51] Whether measured by the "guardian-ward" concept applied by Congress to Indians,[52] by the obligation of an acquiring nation to a people whose lands had been taken without just cause,[53] by the "domestic dependent nation" concept articulated by this Court[54] or a fiduciary

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1986-90, Hawai'i's Legislature submitted 15 amendments to the U.S. Congress for ratification. Congress consented to 10, withheld consent to 4, and 1 was deemed not to require submission. Pub. L. 102-288, 106 Stat. 1953 (1992); Pub. L. 105-21, 111 Stat. 235 (1997). This ongoing oversight reflects the continuing federal interest in State legislation relating to native Hawaiians and the continuing vitality of the delegation of authority in the Admissions Act.

[51] *Morton v. Mancari*, 417 U.S. 535, 553-555 (1974); *Delaware Tribal Business Committee v. Weeks*, 430 U.S. 73 (1977); *United States v. Johns*, 437 U.S. 634 (1978).

[52] "Not only does the Constitution expressly authorize Congress to regulate commerce with the Indian tribes, but long continued legislative and executive usage and unbroken current of judicial decisions have attributed to the United States as a superior and civilized nation the power and the duty of exercising a fostering care and protection over all the dependent Indian communities within its borders, whether within its original territory or territory subsequently acquired, and whether within or without the limits of a State . . . It is for that body [Congress] and not for the courts to determine when the true interests of the Indian require his release from such condition of tutelage." *United States v. Candelaria*, 271 U.S. 432 (1926) citing *United States v. Sandoval*, 231 U.S. 28, 45-47 (1913)).

[53] *Felix S. Cohen's Handbook of Federal Indian Law* 50-58 (2d ed. 1982).

[54] *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 17 (1831) (tribes are described as "domestic dependent nations . . . in a state of pupilage. Their relation to the United States resembles that of a ward to his guardian."); *see also United States v. Kagama*, 118 U.S. 385 (1886).

standard,[55] the United States undertook special responsibilities to the indigenous people of Hawaii when the United States acquired both Hawai'i and its public government and crown lands. Congress has never extinguished these rights or its special relationship with indigenous Hawaiian people. To deny such a relationship would require repudiating not just the HHCA but also the foundations of Hawai'i's Admission Act and more than seven decades of Congressional solicitude for the needs of Hawaiians.

E. OHA And Its Voting Requirements Are Part Of The Panoply Of Political Measures That Federal And State Sovereigns Designed To Address The Harms Attendant To The Loss Of Hawaiian Nationhood.

The years following statehood brought massive development to the islands, and motivated Hawaiians to protect rural communities where traditional and customary Hawaiian practices still survived.[56] Greater public understanding of Hawaiian issues eventually resulted in the adoption of a number of governmental programs.[57]

In 1978, the people of Hawai'i determined that proper fulfillment of § 5 trust obligations required them to provide Hawaiians with a measure of control over their own destinies. In this context, OHA and its beneficiary-chosen leadership are properly seen as one part of a panoply of political acts by state and federal sovereigns that are designed to address,

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[55] *United States v. Mitchell*, 463 U.S. 206, 225-227 (1983); *Ahuna v. Department of Hawaiian Home Lands*, 64 Haw. 327, 640 P.2d 1161 (1982).

[56] Davianna McGregor-Alegado, *Hawaiians: Organizing In The 1970s*, 7 Amerasia Journal 29, 37 (1980).

[57] Jon M. Van Dyke, *The Political Status of the Native Hawaiian People*, 17 Yale L. & Policy Rev. 95, 106 and n.67 (1998) (listing legislation).

directly and indirectly, the loss of sovereignty and nationhood by the indigenous Hawaiian people:

> Hawai'i is the homeland of *ka po'e Hawai'i* [the Hawaiian people]. These islands have shaped and sustain a unique culture that struggles to survive the loss of sovereignty, alienation from the land, dominance of their cultures, and the concomitant decline of the general welfare of Hawaiians. The Office of Hawaiian Affairs was established in recognition and in response to the severe social, economic, cultural, and spiritual problems of Hawaiians. It is therefore the mission of OHA to: Strengthen and maintain the Hawaiian people and their culture as powerful and vital components in society.[58]

This concern for restoring a sense of sovereign autonomy to a dispossessed and disenfranchised people is central to the trust obligations that Congress has shared with the State of Hawai'i. In pursuing this mission, OHA – in tandem with the *HAWAIIAN HOMES COMMISSION* – is supporting Congress' goal of rehabilitating and sustaining the well-being of the indigenous people of Hawai'i.

Both the federal executive and legislative branches have acknowledged that "the health and well being of the Native Hawaiian people is intrinsically tied to their deep feelings and attachment to the land"[59] – attachments severed in part by the

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[58] Office of Hawaiian Affairs, *Native Hawaiian Data Book* iii (1998).

[59] Public Law 103-150. *See also* Native Hawaiian Health Research Consortium, Mental Health Task Force & Alu Like, Inc., *E Ola Mau: Native Hawaiian Health Needs Study, Mental Health Task Force Report*, viii (1985); *Administration of Native Hawaiian Home Lands: Joint Hearings Before The Select Committee On Indian Affairs United States Senate And The Committee On Interior And Insular Affairs House Of Representatives*, 101st Cong., 1st Sess. 37-38 (1989) (noting that Hawaiians' life expectancy, death rate, and disease rate were as much 126% to 588% higher than all other groups in the U.S.). As a result of sobering statistics like these, Congress passed the Native Hawaiian Health Care Improvement Act ("Health Care Act"), Pub. L. No. 100-579, 102 Stat. 2916 (1988) (now codified in 42 U.S.C. §§ 10101-12300 (1995)). Congress

loss of Hawaiian lands. As with other aboriginal people in the United States, the effects of losing control over ancestral land and resources can be seen in virtually every indicator of social or economic progress. "These statistics reflect the individual and collective pain, bitterness and trauma of a people . . . who are dispossessed in their own homeland; and who lack control of the resources of their ancestral lands to provide for the welfare of their people."[60]

The government's acknowledgment of the profound cultural destruction and spiritual suffering attendant to the loss of nationhood, passed from generation to generation, is an appropriate way to advance the political process of reconciliation with Native Hawaiians.[61] Congress has both acquiesed[62] in and ratified[63] Hawai'i's constitutional amendments and statutory laws creating OHA. OHA now provides Native Hawaiian beneficiaries with a direct voice in the management of their trust resources. This is entirely proper given the United States' delegation of authority to the state, Hawai'i's geographic isolation in the middle of the Pacific, and Hawaiians' unique political, cultural, and social history.

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authorized these special benefits in express recognition of "the historical and unique legal relationship" between Hawaiians and the United States government. 42 U.S.C. §§ 11701(19)-(21) (1995).

[60] Luciano Minerbi, Davianna McGregor & Jon Matsuoka, *Native Hawaiian and Local Cultural Assessment Project* 15 (1993).

[61] *See* Public Law 103-150, secs. 1(4) & (5) (expressing Congress' "commitment to acknowledge the ramifications of the overthrow of the Kingdom of Hawaii, in order to provide a proper foundation for reconciliation between the United States and the Native Hawaiian people" and urging the President to support reconciliation efforts). *Cf.* Eric K. Yamamoto, *Interracial Justice: Conflict & Reconciliation in Post-Civil Rights America*, 60-78, 210-35 (1999).

[62] *Cf. Arizona v. California*, 373 U.S. 546, 597-98 (1963) (presidential executive order reserving water on federal land upheld in light of congressional acquiesence); *U.S. v. Midwest Oil*, 236 U.S. 459, 469-75 (1915) (presidential proclamation withdrawing lands from petroleum exploration upheld in light of congressional acquiesence).

[63] *See supra* note 57.

F. Despite The Overthrow And Annexation Of The Hawaiian Nation, Hawaiian Culture Has Survived – The Hawaiian People Have A Unique Culture That Continues Today.

Despite all of the burdens imposed upon them over the past two centuries, Hawaiians continue to nurture and celebrate the unique traditions of their ancestors.[64]

Aloha 'Āina (Love of the Land) – Native Hawaiians honored their bond with the land (*aloha 'āina*) by instituting one of the most sophisticated environmental regulatory systems on earth, the *kapu* system. For Hawaiians, the life of the land depended on the righteousness of the people.[65] This concept motivated three decades of effort by Hawaiian leaders to regain Kaho'olawe, an island with deep spiritual significance. Once a military bombing practice target, Kaho'olawe is now listed in the National Historic Register, and is the subject of a massive federal clean-up project.[66]

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[64] *See generally* Jay Hartwell, *Na Mamo: Hawaiian People Today* (1996) (profiles of contemporary individuals who practice Hawaiians traditions and customs, including farming, music, *hula*, Hawaiian language, canoeing, surfing, *kapa* (bark cloth) making, *la'au lapa'au* (Hawaiian healing), *pono* (justice), and religion). Excerpts of the book are available at *http://www.lava.net/namamo*.

[65] The State's motto reflects this concept: "Ua mau ke ea o ka 'āina i ka pono." (The life of the land is perpetuated in righteousness.) Haw. Const. art. XV, § 5 (1978).

[66] *Kaho'olawe Island: Restoring a Cultural Treasure, Final Report of the Kaho'olawe Island Conveyance Commission to the Congress of the United States* 2 (March 31, 1993) ("This report calls upon the United States government to return to the people of Hawai'i an important part of their history and culture, the island of Kaho'olawe. The island is a special place, a sanctuary, with a unique history and culture contained in its land, surrounding waters, ancient burial places, fishing shrines, and religious monuments."). Title X of the Fiscal Year 1994 Department of Defense Appropriations Act, Pub. L. No. 103-139, 107 Stat. 1418 (1994) was enacted on November 11, 1993. Section 10001(a) of Title X states that the island of Kaho'olawe is among Hawai'i's historic lands and has a long, documented history of cultural and natural significance to the people of

Subsistence – Ancient Hawaiians supplemented the produce of their farms and fishponds by fishing, hunting and gathering plants. These subsistence activities became increasingly more difficult to pursue as changing land ownership patterns barred access to natural resources. Nonetheless, in predominantly Hawaiian rural areas such as Hana, Puna, and the island of Moloka'i, native Hawaiians continue to feed their families as their ancestors did before them.[67] Hawai'i law has always guaranteed subsistence gathering rights to the people so they may practice native customs and traditions.[68]

Kalo (Taro Cultivation) – In Hawaiian legend, the staple crop of *kalo* (taro) was revered as the older brother of the Hawaiian people.[69] Taro cultivation was not only a means of sustenance, but also a sacred duty of care to an older sibling.

Hawaii. It authorized $400,000,000 to be spent for the clean-up of military ordnance from portions of the island. *Id. See* Haw. Rev. Stat. Chap. 6K (1993). The state Kaho'olawe Island Reserve Commission holds the resources and waters of the island of Kaho'olawe in trust until such time as the State of Hawai'i and the federal government recognize a sovereign Hawaiian entity. *Id.* at § 6K-9.

[67] *See* Davianna McGregor, *et al., Contemporary Subsistence Fishing Practices Around Kaho'olawe: Study Conducted for the NOAA National Marine Sanctuaries Program* (May 1997). *See also* Jon K. Matsuoka, *et al., Governor's Moloka'i Subsistence Task Force Report* (1993); Andrew Lind, *An Island Community: Ecological Succession in Hawaii* 102-03 (1968 ed.). (observing, in 1938, that traditional and customary practices survived in rural "havens where the economy of life to which they are best adapted can survive."). Hawaiian homestead tracts provide such rural havens.

[68] Haw. Const. art. XII, § 7 (1978). Hawaiian usage supersedes other sources of common law in Hawai'i. Haw. Rev. Stat. § 1-1 (1993); *Branca v. Makuakane*, 13 Haw. 499, 505 (1901) ("The common law was not formally adopted until 1893 and then subject to precedents and Hawaiian national usage."). *See also* Haw. Rev. Stat. § 7-1 (1993); *Kalipi v. Hawaiian Trust Co.*, 656 P.2d 745 (Haw. 1982).

[69] *See supra* note 14.

As land tenure changed, however, the ancient, stream-irrigated taro paddies (*lo'i*) were lost to newer crops, encroaching development, and the diversion of rivers and streams.[70] In recent years, Hawaiians reclaimed and restored ancient taro fields, and formed a statewide association of native planters, *'Onipa'a Na Hui Kalo*.

'Ohana (Extended Family) – In the earliest era of Hawaiian settlement, governance was a function of the family.[71] For Hawaiians, family included blood relatives, beloved friends (*hoaloha*) and informally adopted children (*hānai*).[72] Family genealogies were sacred, and passed down in the form of oral chants only to specially chosen children – when those children were barred from learning their language, many of these ancient genealogies were lost. Nevertheless, family traditions of respect for elders, mutual support for kin and the adoption of related children have continued over the past two centuries:

> The *'ohana* beliefs, customs, and practices predated the *ali'i*; coexisted under the rule of the *ali'i*; and have continued to be practiced, honored and transmitted to the present. The *'ohana* continued to honor their *'aumakua* (ancestral deities). Traditional *kahuna la'au lapa'au* (herbal healers) continued their healing practices using native Hawaiian

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[70] *See, e.g., Reppun v. Board of Water Supply*, 656 P.2d 57 (Haw. 1982) (in this case, taro growers prevailed against water diversions that would have adversely affected their crops), *cert. denied*, 471 U.S. 1014 (1985).

[71] *See generally Handy and Pukui, supra* note 10; 1 Mary Kawena Pukui, E.W. Haertig & Catherine A. Lee, *Nānā I Ke Kumu* 49-50 (6th prtg. 1983) (explaining Hawaiian concepts of adoption and fostering).

[72] *'Ohana* is a concept that has long been recognized by Hawai'i courts. *See, e.g., Leong v. Takasaki*, 520 P.2d 758, 766 (Haw. 1974); *Estate of Emanuel S. Cunha*, 414 P.2d 925, 928-29 (Haw. 1966); *Estate of Farrington*, 42 Haw. 640, 650-51 (1958); *O'Brien v. Walker*, 35 Haw. 104, 117-36 (1939), *aff'd*, 115 F.2d 956 (9th Cir. 1940), *cert. denied*, 312 U.S. 707 (1941); *Estate of Kamauoha*, 26 Haw. 439, 448 (1922); *In re Estate of Nakuapa*, 3 Haw. 342, 342-43 (1872).

> plants and spiritual healing arts. Family burial caves and lava tubes continued to be cared for. The hula and chants continued to be taught, in distinctly private ways, through *'ohana* lines.[73]

Today, there is an extensive and growing network of reclaimed family genealogies, one of which is formally maintained by OHA (Operation *'Ohana*). Huge Hawaiian family reunions are routinely held throughout the islands, in every week of the year. In honor of a cultural tradition that reveres the taro root as the older brother of the Hawaiian race, these modern activities are called "*ho'i hou i ka mole*," or "return to the tap-root."

'Iwi (Bones) – In Hawaiian culture, the bones of the deceased carried the *mana* (spiritual power) of the decedent. These bones were treated with great reverence, and fearful consequences were sure to befall any who desecrated them. The protection of the bones of their ancestors remains a solemn responsibility for modern day Hawaiians. The State of Hawai'i has recognized the importance of protecting Hawaiian burial sites, and established a Hawaiian Burial Council to ensure the *'iwi* of Hawaiian ancestors are treated with proper respect.[74]

Wahi Kapu (Sacred Places) – Ancient Hawaiians also recognized certain places as sacred, and took extraordinary measures to prevent their desecration. A modern day example of this concept is found at *Mauna 'Ala* on the island of 'Oahu, where the remains of Hawai'i's ali'i (monarchs) are interred. This royal mausoleum is cared for by a *kahu* (guardian), who is the lineal descendant of the family charged since antiquity with protecting the bones of this line of chiefs.

'Ōlelo Hawai'i (Hawaiian Language) – "*I ka 'olelo no ke ola; i ka 'olelo no ka make.* With language rests life, with

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[73] McGregor, *supra* note 13, at 9.

[74] Haw. Rev. Stat. § 6E-43.5 (1993). This provision requires consultation with appropriate Hawaiian organizations, like *Hui Mālama I Nā Kūpuna O Hawai'i Nei. See* http://www.pixi.com/~huimalam.

language rests death."[75] The Hawaiian language was banned from the schools in 1896.[76]

> During the Republic and Territory, Hawaiian was strictly forbidden anywhere within schoolyards or buildings, and physical punishment for using it could be harsh. Teachers who were native speakers of Hawaiian (many were in the first three decades of the Territory) were threatened with dismissal for using Hawaiian in school. Some were even a bit leery of using *Hawaiian place names* in class. Teachers were sent to Hawaiian-speaking homes to reprimand parents for speaking Hawaiian to their children.[77]

The language was kept alive in rural Hawaiian families and in the *mele* and *oli* (songs and chants) of native

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[75] Ka'ū: University of Hawai'i Hawaiian Studies Task Force Report 23 (Dec. 1986). These anti-Hawaiian language efforts, which were falsely cast in terms of assimilation and societal unity. Nevertheless, the core issues of sovereignty and self-determination remained – for, "to destroy the language of a group is to destroy its culture." Adeno Addis, *Individualism, Communitarianism, and the Rights of Ethnic Minorities*, 66 Notre Dame L. Rev. 1219, 1270 (1991).

[76] 1 Revised Laws of Hawaii § 2, at 156 (1905). As a direct result of this law, the number of schools conducted in Hawaiian dropped from 150 in 1880 to zero in 1902. Albert J. Schütz, *The Voices of Eden: A History of Hawaiian Language Studies* 352 (1994) [hereinafter *Schütz*]. Hawaiian language newspapers, which were the primary medium for communication in Hawaiian at that time, declined from a total of twelve (nine secular and three religious) in 1910 to one religious newspaper in 1948. *Id.* at 362-63.

[77] Larry K. Kimura and William Wilson, 1 *Native Hawaiians Study Commission Minority Report*, 196 (U.S. Dept. of Interior 1983). *See also* Davianna McGregor-Alegado, *Hawaiians: Organizing in the 1970s*, 7 Amerasia Journal 29, 33 (1980) ("Through a systematic process of assimilation in the schools, especially restricting the use of the native language, Hawaiians were taught to be ashamed of their cultural heritage and feel inferior to the *haole* American elite in Hawaii.").

speakers.[78] In 1978, the Hawai'i State Constitution was finally amended to make Hawaiian one of the two official languages of the state.[79] In the two decades since, Hawaiian language has become a required offering in the state Department of Education curriculum, and private non-profit Hawaiian language schools have been established on all major islands, with the assistance of federal funds.[80] In 1997-1998, 1,351 students were enrolled in fourteen Hawaiian language immersion programs throughout the State, from pre-school through high school.[81] Hawaiian remains the first language of the native community located on the isolated island of Ni'ihau, which was spared the effects of the 1896 ban.[82]

Ho'oponopono (Conflict Resolution)[83] – This ancient Hawaiian tradition of problem solving resembles the Western

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[78] "[T]he renewal of interest in the Hawaiian language and culture in the 1970s did not relight an extinguished flame, but fanned and fed the embers[.]" *Schütz, supra* note 27, at 361.

[79] Haw. Const. art. XV, sec. 4 (1978). *See also* Haw. Const. art. X, sec. 4 (1978) (requiring the State to "promote the study of Hawaiian culture, history and language . . . [through] a Hawaiian education program . . . in the public schools."). Restrictions on the use of Hawaiian language in public schools were not actually lifted until 1986. *See* Haw. Rev. Stat. § 298-2(b) (1993).

[80] Native Hawaiian Education Act, Pub. L. No. 103-382, § 101, 108 Stat. 3518 (Oct. 20, 1994).

[81] Office of Hawaiian Affairs, *Native Hawaiian Data Book* 244-45 (1998) (Table/Figure 4.22). Projected enrollment for the 2005-2006 school year is 3,397. *Id.* Dramatic increases in the enrollment of Hawaiians at the University of Hawai'i took place shortly after adoption of the 1978 Constitutional Amendments and again after statutory restrictions were lifted in 1986 on use of the Hawaiian language in schools. *Id.* at 216-17 (Table/Figure 4.7). According to the 1990 Census, Hawaiian is spoken in 8,872 households. *Id.* at 240-41 (Table/Figure 4.20).

[82] Karen Silva, *Hawaiian Chant: Dynamic Cultural Link or Atrophied Relic?*, 98 Journal of the Polynesian Society 85, 86-87 (1989), *cited in* Schütz, *supra* note 27, at 357.

[83] *See generally* Victoria Shook, Ho'oponopono, *Contemporary Uses of a Hawaiian Problem-Solving Process* (1985).

practice of mediation, but with the addition of a deeply spiritual component. It was and is traditionally practiced within families, and used to resolve disputes, cure illnesses, and reestablish connections between family members and their *akua* (gods). Today, trained practitioners are formally teaching the *ho'oponopono* methods, and there has been a resurgence of its use. The state courts have implemented a formal *ho'oponopono* program that is designed to help families to resolve their problems outside the courtroom.

Civic Associations – Prior to Annexation, Native Hawaiians were active participants in the political life of the Islands. Political associations were organized to protest against the Bayonet Constitution of 1887 and subsequent annexation efforts.[84] Hawaiian Civic Clubs were established at the turn of century to campaign against the destitute and unsanitary living conditions of Hawaiians in the city of Honolulu and its outskirts.[85] These associations still exist, and count among their membership many of Hawai'i's most distinguished native leaders. In addition, Hawaiians living on Hawaiian Home Lands have, from the program's beginning in 1921, established homestead associations. The oldest of these associations, the *KALAMA'ULA HOMESTEAD ASSOCIATION*, is an *amicus* in this brief.

La'au Lapa'au (Hawaiian Healing) – Quietly practiced over the past two centuries following European contact, Hawaiian medicine has always been an important alternative to Western medical care. Today, it is credible form of treatment for many.[86] Practitioners use Hawaiian medicinal plants

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[84] *Hui Kalai'āina*, a Hawaiian political organization, lobbied for the replacement of the 1887 Bayonet Constitution, and led mass, peaceful protests that stalled negotiations for a new Treaty of Reciprocity. *Kuykendall, supra* note 5, vol. III, at 448; *Silva, supra* note 27, at 45.

[85] Davianna Pomaika'i McGregor, *'Āina Ho'opulapula: Hawaiian Homesteading*, 24 The Hawaiian Journal of History 1, 4-5 (1990).

[86] Isabella Aiona Abbott, *La'au Hawai'i: Traditional Uses of Hawaiian Plants* 135 (1992); Nanette L. Kapulani Mossman Judd, *La'au Lapa'au: herbal healing among contemporary Hawaiian healers*, 5 Pacific

(*la'au*), massage (*lomilomi*), and spiritual counseling to heal. Hawaiian health centers, established with federal financial support,[87] now incorporate traditional Hawaiian healing methods into their regimens of care.

Hālau Hula (*Hula* Academies) – Once banned by missionaries as a sacrilege, the ancient art of *hula*,[88] accompanied by chanting in the native tongue, flourishes today. *Hālau* exist throughout the islands, and *hula* and chants are now regularly incorporated into public ceremonies.

Voyaging/Celestial Navigation – Ancient Hawaiians were skilled navigators, finding their way thousands of miles across the open Pacific using only the stars and the currents as guides. In the 1970's, a group of Hawaiians formed the Polynesian Voyaging Society. The Society researched Polynesian canoe-making and navigating traditions, and commissioned the construction of an historically authentic double-hulled voyaging canoe, the *Hokule'a* ("Star of Gladness"). A Native Hawaiian crew was trained to sail the canoe, and a Native Hawaiian navigator was chosen to learn the art of celestial navigation from one of its few remaining Polynesian practitioners. The canoe's first voyage to Tahiti in 1976 was tremendously successful. It confirmed the sophisticated navigational skills of ancient Polynesians and also instilled a

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Health Dialog Journal of Community Mental Health and Clinical Medicine for the Pacific: The Health of Native Hawaiians 239-45 (1998).

[87] These traditional methods of healing are recognized and financed through appropriations under the Native Hawaiian Healthcare Act of 1988, Pub. L. No. 100-579, 102 Stat. 2916 (now codified at 42 U.S.C. §§ 11701, *et seq.*).

[88] "[A] few chanters, dancers, and teachers among the *po'e hula* [hula people] kept alive the more traditional forms, and with the flowering of the 'Hawaiian Renaissance' in the 1970's their knowledge and dedication became a foundation for revitalizing older forms." Dorothy B. Barrére, Mary Kawena Pukui & Marion Kelly, *Hula Historical Perspectives* 1-2 (1980). *Hula* was recently designated the state dance. Act 83, Relating To Hula (June 22, 1999) (to be codified at Haw. Rev. Stat. Chapter 5).

sense of pride in Hawaiian culture.[89] Other canoes have been built, and more voyages made since (the *Hokule'a* is currently sailing to the tiny island of *Rapa Nui* – Easter Island).[90] The art of voyaging is alive and well in modern Hawai'i, a testament to the skill and courage of the ancient navigators who first settled these islands.

Hawaiians today live in a markedly different world from the one that shaped their ancient practices. Yet they struggle to perpetuate a culture passed down to them through two millennia. In the words of a plaintive song written by one of OHA's trustees:

> *Me na mea 'oi loa mai na wa mamua, o holomua kakou i keia au*
>
> (Let us move forward to the future, carrying with us the best of the past)
>
> *E mau ana ka ha'aheo, ka ha'aheo o ka nohona*
>
> (The pride endures, the pride in our way of life)
>
> *E kukulu a'e kakou no ke ea o ka 'aina me ke aloha a me ke ahonui.*
>
> (Let us press forward together for the life of our land, in the spirit of love and patience)[91]

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[89] Ben Finney, *Voyage of Rediscovery: A Cultural Odyssey through Polynesia* (1995). In 1995, the *Hokule'a* and *Hawai'iloa* sailed to the Marquesas Islands. PBS recently broadcast an hour-long documentary of this voyage entitled *Wayfinders – A Pacific Odyssey. See http://pbs.org/wayfinders.*

[90] *Hokule'a* left Hawai'i on June 15, 1999 for *Rapa Nui. See* http://leahi.kcc.hawaii.edu/org/pvs for reports on the voyage's progress and educational programs and materials.

[91] *E Mau ana ka Ha'aheo* (The Pride Endures) by S. Haunani Apoliona (1991)

CONCLUSION

Amici respectfully request that the decision of the court of appeals be affirmed.

DATED: Honolulu, Hawai'i, July 28, 1999.

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